1-2007

The Constitutionality of the President to Hold Another Office Act, 2004: A View from India

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"But what, after all, is a law? […] When I say that the object of laws is always general, I mean that law considers subjects en masse and actions in the abstract, and never a particular person or action." Thus spoke Jean-Jacques Rousseau in his eighteenth century classic, *The Social Contract*. More than two centuries later, it has fallen on the judges of the Supreme Court to assess the veracity of that claim.

The background to the controversy is relatively simple. The Parliament enacted a law making it possible for a person to be the President and the Chief of Army Staff simultaneously. But in so doing, it restricted the applicability of the law to the incumbent President only: the law was for General Musharraf and General Musharraf alone. Is such a law constitutionally valid? I consider the question from an Indian perspective: would such a law stand the test of constitutionality in India?

Article 14 of the Indian Constitution, like Article 25(1) of the Constitution of Pakistan guarantees equality: "The State shall not deny to any person equality before the law or the equal protection of the laws ..." The PHAO was enacted for General Musharraf only. Does it violate the guarantee of "equal protection of the laws"?

The Indian Supreme Court has consistently interpreted the provision to mean that it forbids discrimination between persons who are substantially in similar circumstances. As the Court once put it in: "The equal protection of the laws … does not mean that all laws must be general in character and universal in application."

But classifications that legislations make must be reasonable: it must be based on an intelligible distinction between persons included in the law and those excluded from it. Secondly, the distinction must be related to the object that the law seeks to achieve.

In *Chiranjit Lal*, a law transferring the ownership of a particular private company to the Government was challenged. The Supreme Court upheld the law. The private company, it said, formed a class by itself because the mismanagement of the company's affairs prejudicially affected the production of an essential commodity and caused serious unemployment.

However, since then the Court has been very reluctant to uphold "single person" laws. In *Ameerunnisa Begum's* case, a law was enacted to settle a property dispute between two rival parties. The Supreme Court declared the law invalid. There were many property disputes pending before the courts of law and there was no justification for discriminating against particular litigants.

General Musharraf's desperate bid to retain power is in many ways reminiscent of then-prime minister Indira Gandhi's antics to subvert the Constitution during the Emergency. The Allahabad High Court had invalidated Mrs. Gandhi's election. During the pendency

of her appeal before the Supreme Court, the Parliament amended the Constitution with retrospective effect to bar any court from questioning the validity of any person who is or has been the Prime Minister. No court in India any longer had authority to decide on the election petition against Mrs. Gandhi!

The amendment, of course, was different in two important respects from the current situation in Pakistan. First, it was a *constitutional* amendment rather than a simple legislation. Secondly, unlike PHAO, the amendment did not name Indira Gandhi specifically. But the similarity is striking: in both cases the purpose of the law was to legitimize what would have otherwise been an unlawful occupation of public office.

The Supreme Court invalidated the constitutional amendment on the ground that the Parliament had usurped judicial functions. Judge Matthews, in his concurring opinion, considered in detail the necessity of "general laws." He cited with approval the views of Blackstone, Bagehot, Hayek and Friedman: for them, the requirement of generality was law's first desideratum.

So what does all this add up to? If the PHAO is to pass muster, it must be shown that General Musharraf is a class by himself. Secondly, that there is a rational object that the law achieves by limiting its application to General Musharraf alone. What distinguishes General Musharraf from any other aspiring President? What has he done to enjoy a special privilege that ordinary Pakistanis cannot? What does the law achieve except to satisfy his quest for power and security?

If the above principles are to apply, there is good reason to suspect the constitutionality of the PHAO. Invalidating the PHAO may be one way of "nullifying" General Musharraf (even assuming he agrees to abide by the decision.) But legal principles, as an American jurist once pointed, are Janus-faced. Because, by the same logic, even the constitutionality of the National Reconciliation Ordinance, 2007 is equally suspect. After all, there is hardly any reason why an offer of "national reconciliation" should be arbitrarily offered to some politicians and not others.

Judges have an unenviable choice to make. Strike down the PHAO and they may be invited to strike down the NRO. The pragmatic thing may be to simply uphold both and give the moth-eaten politicians another opportunity to invest in democratic politics rather than face the wrath of Musharraf's Emergency. Oliver Wendell Holmes, the American realist, once famously said: "The life of law is not logic but experience." It may be time for the judges in the Supreme Court of Pakistan to disown the "logic" of Kelsen and adopt the "experience" of Holmes.

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